



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

Order Authorizing the National Futures Association as a Commission Designee for Direct Electronic Access to Data in Swap Data Repositories

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice and order.

SUMMARY: The Commodity Futures Trading Commission (“Commission”) is issuing an order (“Order”) authorizing the National Futures Association (“NFA”) as a Commission designee to receive direct electronic access to data maintained in swap data repositories (“SDRs”) registered with the Commission. The Commission is authorized to designate persons to receive direct electronic access to SDR data pursuant to Section 21(c)(4)(A) of the Commodity Exchange Act (“CEA”). NFA is registered with the Commission as a registered futures association (“RFA”) pursuant to Section 17 of the CEA. Direct access to SDR data will facilitate NFA’s performance of functions delegated to NFA by the Commission, as well as the performance of other duties authorized by the CEA and the Commission. As a condition to authorizing NFA as a Commission designee, NFA is required to keep all non-public information received through direct electronic access to SDR data confidential and to refer any request for such data to the Commission for handling.

DATES: Effective date: **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Eileen T. Flaherty, Director, 202-418-5326, eflaherty@cftc.gov, or Frank Fisanich, Chief Counsel, 202-418-5949,

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SUPPLEMENTARY INFORMATION:

I. Authority and Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ amended the CEA² to establish a comprehensive new regulatory framework for swaps. Amendments to the CEA included the addition of provisions requiring the retention, and the reporting to Commission-registered SDRs, of data regarding swap transactions in order to enhance transparency, promote standardization, and reduce systemic risk. Such amendments also included certain core principles governing the operations of SDRs. Pursuant to these newly added provisions, the Commission adopted certain SDR registration requirements and provisions implementing core principles in part 49 of its regulations,³ and adopted rules for the reporting of swap transaction data to registered SDRs in parts 45 and 46 of its regulations.⁴

Section 21(c) of the CEA sets forth the duties of a registered SDR. Among them is the duty to provide direct electronic access to the Commission (or any designee of the Commission).⁵ “Direct electronic access” is defined in Commission regulation 49.17(b)(3) as “an electronic system, platform or framework that provides internet or

¹ Public Law 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. 1 et seq.

³ See Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011).

⁴ Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012).

⁵ See Section 21(c)(4)(A) of the CEA, 7 U.S.C. 24a(c)(4)(A).

web-based access to real-time swap transaction data and also provides scheduled data transfers to the Commission's electronic systems.”⁶ As used herein, “direct electronic access to SDR data” means “an electronic system, platform, or framework that provides internet or web-based access to real-time swap transaction data and/or swap transaction data transfers.”

As the Commission stated in adopting the SDR registration requirements, direct electronic access by the Commission is a critical function and responsibility of an SDR because real-time access to swap data is necessary for adequate oversight and surveillance of the swaps market.⁷ The Commission implemented the access requirements for Commission designees under Section 21(c)(4)(A) of the CEA by adopting Commission regulation 49.17(c)(1).

Pursuant to Commission regulation 170.1, a basic purpose of an RFA is to regulate the practices of its members.⁸ In order to help NFA achieve this purpose and strengthen its regulatory oversight of its members, including registered swap dealers (“SDs”) and major swap participants (“MSPs”), NFA has requested direct electronic access to all SDRs.

II. Use of SDR Data

NFA is the only futures association registered with the Commission pursuant to Section 17 of the CEA and the Commission, as detailed below, has over decades

⁶ 17 CFR 49.17(b)(3).

⁷ See Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538, 54551-52 (Sept. 1, 2011).

⁸ 17 CFR 170.1.

delegated many Commission functions to NFA.⁹ Pursuant to Section 8a(10) of the CEA,¹⁰ the Commission may authorize any person – including an RFA – to perform any of the registration functions under the CEA. Further, pursuant to Section 17(o) of the CEA,¹¹ the Commission may require an RFA to perform registration functions under the CEA with respect to its members. The Commission has previously authorized NFA to perform the full range of registration functions with regard to applicants for Commission registration and Commission registrants, including registration of SDs and MSPs.¹² Additionally, pursuant to Sections 4p, 8a, and 17 of the CEA, the Commission issued Commission regulation 170.16 requiring each registered SD and MSP to become and remain a member of an RFA. As the only RFA, all registered SDs and MSPs are members of NFA.

Other Commission functions delegated to NFA include: reviewing disclosure documents and providing the Commission with related summaries and periodic reports;¹³

⁹ 7 U.S.C. 21.

¹⁰ 7 U.S.C. 12a(10).

¹¹ 7 U.S.C. 21(o).

¹² See e.g., Performance of Registration Functions by National Futures Association, 49 FR 39593 (Oct. 9, 1984); 50 FR 34885 (Aug. 28, 1985); 51 FR 34490 (Sept. 29, 1986); Performance of Registration Processing Functions by National Futures Association With Respect to Floor Traders and Floor Brokers, 58 FR 19657 (Apr. 15, 1993); Performance of Certain Functions by National Futures Association With Respect to Non-U.S. Firms and Non-U.S. Markets, 62 FR 47792 (Sept. 11, 1997); Performance of Certain Functions by National Futures Association with Respect to Commodity Pool Operators and Commodity Trading Advisors, 62 FR 52088 (Oct. 6, 1997); Performance of Registration Functions by National Futures Association With Respect to Swap Dealers and Major Swap Participants 77 FR 2708 (Jan. 19, 2012).

¹³ See 62 FR 52088 (Oct. 6, 1997); 64 FR 29273 (June 1, 1999).

and acting as the Commission's official custodian of records.¹⁴ The Commission has found that NFA exercises its delegated authority with proficiency.¹⁵

In addition to performing functions delegated by the Commission, Section 17(p)(2) of the CEA requires an RFA to establish minimum capital, segregation, and other financial requirements applicable to its members for which such requirements are imposed by the Commission and implement a program to audit and enforce compliance with such requirements, except that such requirements may not be less stringent than those imposed on such firms by the CEA or by Commission regulation.¹⁶

Pursuant to such requirement, where the Commission has imposed minimum financial requirements for its registrants, NFA has established minimum financial requirements for such registrants that are members of NFA that are no less stringent than those imposed by Commission regulations.¹⁷ All NFA rules and rule amendments are submitted to the Commission for review and approval, as required by Section 17(j) of the CEA.

¹⁴ See, e.g., 49 FR 39593 (Oct. 9, 1984) (regarding the registration records of future commission merchants, commodity pool operators, and commodity trading advisors); 66 FR 43227 (Aug. 17, 2001) (regarding notice registration filings as futures commission merchants or introducing brokers); 67 FR 77470 (Dec. 18, 2002) (regarding commodity pool operator annual financial reports required by regulation 4.22 and 4.7(b)(3)); 75 FR 55310 (Sep. 10, 2010) (regarding the registration records of retail foreign exchange dealers); and 77 FR 2708 (Jan. 19, 2012) (regarding registration records of swap dealers and major swap participants).

¹⁵ See, e.g., 67 FR 77470 (Dec. 18, 2002).

¹⁶ 7 U.S.C. 21(p)(2).

¹⁷ NFA's financial requirements for its members are contained in the NFA Manual, available on its website: <http://www.nfa.futures.org/nfamanual/NFAManualTOC.aspx?Section=7>. With respect to minimum financial requirements for SDs and MSPs, the Commission has proposed capital rules. See Capital Requirements of Swap Dealers and Major Swap Participants, 76 FR 27802 (May 12, 2011). In addition, the Commission has recently promulgated margin requirements for SDs and MSPs. See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). NFA will in due course establish minimum financial requirements for its SD and MSP members that are no less stringent than the capital and margin requirements for SDs and MSPs imposed by the Commission.

In order for NFA to adequately implement a program to audit and enforce compliance as required under Section 17(p)(2) of the CEA, to regulate the practices of its members pursuant to Commission regulation 170.1, and to carry out the functions delegated to it by the Commission, the Commission has determined that it is necessary for NFA to obtain SDR data. This information, together with adequate financial reporting by its members, will better enable NFA to monitor compliance with its minimum financial and other requirements.

In requesting access to SDR data, NFA has stated that, as a front-line regulator of SDs and MSPs, it may be necessary in certain situations (e.g., investigations) for NFA to obtain data directly from an independent source, such as an SDR, as opposed to relying solely on data submitted by member firms. Furthermore, NFA has stated that if it had access to firm level transaction data on a regular (e.g., monthly or quarterly) basis, then this information would be a significant addition to NFA's SD/MSP risk profiling system. The Commission concurs with NFA's conclusion that it is far more efficient and timely for NFA to collect swap transaction data from a few consolidated sources, i.e., the SDRs, than for NFA to make constant requests either through the Commission or separately to over 100 SDs and MSPs.

Finally, at the request of the Commission, NFA has represented its willingness to develop, at the direction of the Commission, reports generated from analyses of the SDR data NFA receives pursuant to this Order that the Commission or its staff may find necessary or desirable from time to time in order to carry out its legal and statutory responsibilities under the CEA and Commission regulations.

The Commission believes that NFA's direct electronic access to SDR data will permit the Commission to carry out its legal and statutory responsibilities under the CEA, retaining its ultimate decision-making authority, while also freeing up Commission resources to be directed to other parts of its regulatory mandate. NFA may not use the SDR data obtained under the authority provided in this Order for any purpose other than to facilitate NFA's performance of functions delegated to NFA by the Commission and the performance of NFA's functions as an RFA.

III. Confidentiality of SDR Data

As a condition to receiving direct electronic access to SDR data as a Commission designee, NFA must keep all non-public information received through such access confidential.

The SDR data contains information that is protected from disclosure by the Commission by Section 8 of the CEA.¹⁸ Pursuant to Section 8 of the CEA, the Commission is prohibited, except as specifically authorized by the CEA, from publishing data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers, subject to certain exceptions that permit disclosure to: (i) either House of Congress, acting within the scope of its jurisdiction; (ii) a department, central bank and ministries, or agency of the Government of the United States, acting within the scope of its jurisdiction; (iii) a department, central bank and ministries, or agency of any State or any political subdivision thereof, acting within the scope of its jurisdiction; and (iv) any foreign futures authority, or any department, central bank and ministries, or agency of any

¹⁸ 7 U.S.C. 12.

foreign government or any political subdivision thereof, acting within the scope of its jurisdiction.¹⁹

With respect to NFA's obligations regarding public disclosure of information it maintains as an official records custodian of the Commission,²⁰ the Commission notes that NFA Compliance Rule 4-1 defines such information as "CFTC records" and subsection (c) of such rule states that:

Requests for access to CFTC records, or portions thereof, not subject to disclosure as public or publicly available under paragraph (b)(1) of this Rule²¹ shall be referred or transmitted to the Commission for response; except that, NFA will disclose such records or portion thereof:

(1) otherwise with the authorization of the Assistant Secretary of the Commission for FOI, Privacy, and Sunshine Act Compliance or his or her designee, or the General Counsel of the Commission or his or her designee, in accordance with CFTC Regulations 145.7(b), (h) and (i); the Freedom of Information Act, 5 U.S.C. § 552; and the Privacy Act, 5 U.S.C. § 552a; and

(2) to any individual or firm, or person acting on behalf of the individual or firm, who seeks access to his, her or its CFTC records: Provided, however, that NFA receives proper verification of the identity and authority of the party requesting the records.

In order to ensure compliance with the Commission's obligations under Section 8 of the CEA, NFA has represented and confirmed to the Commission that all SDR data obtained by NFA through the direct electronic access authorized by this Order will be subject to more stringent obligations regarding public disclosure than are "CFTC

¹⁹ See Section 8(e) of the CEA; 7 U.S.C. 12(e).

²⁰ See *supra* note 14 for orders by which the Commission determined to authorize NFA to maintain and serve as the official custodian of the Commission's registration records with respect to various Commission registrants.

²¹ NFA Compliance Rule 4-1(b)(1) states: "If any member of the public requests access to CFTC records, or portions thereof, and the requested record, or portion, is "public" or "publicly available" under CFTC Regulations 1.10(g) or 145.0, then NFA will release that record or portion to the requester."

records” under NFA Compliance Rule 4-1. Thus, the Commission is conditioning this Order on NFA’s representation that it will not publicly disclose any information obtained by NFA through the direct electronic access to SDR data authorized by this Order. This Order is further conditioned on NFA’s undertaking that any request for such SDR data received by NFA will be referred to the Commission for response directly by the Commission. Notwithstanding the foregoing, this Order provides that NFA may disclose the SDR data of a firm to such firm upon request, subject to NFA receiving proper verification of the identity and authority of the person making the request on behalf of such firm.

With respect to disclosing to a firm such firm’s own SDR data, the Commission notes that Commission regulation 49.17(f)(2) prohibits an SDR from disclosing to one counterparty the identity or the legal entity identifier (as such term is used in part 45 of the Commission’s regulations) of the other counterparty to a swap, or the other counterparty’s clearing member for the swap, if the swap is executed anonymously on a swap execution facility or a designated contract market and cleared in accordance with Commission regulations in 1.74, 23.610, and 37.12(b)(7). NFA has represented and confirmed that in disclosing to a firm such firm’s own SDR data, such data will not include any information that an SDR would be prohibited from disclosing pursuant to Commission regulation 49.17(f)(2).

IV. Conclusion and Order

For the reasons discussed above, and pursuant to its authority under Section 21(c)(4)(A) of the CEA, the Commission has determined that NFA’s access to SDR data will assist the Commission to carry out its legal and statutory responsibilities under the

CEA and its regulations. Thus, the Commission has determined to, and hereby does, authorize NFA as a designee of the Commission for purposes of receiving direct electronic access to SDR data, subject to the terms and conditions specified below. Accordingly, subject to such terms and conditions, SDRs registered with the Commission must provide NFA with direct electronic access to such data as the Commission's designee in accordance with Commission regulation 49.17(c)(1).

These determinations are based on NFA's representations and demonstration of its willingness and ability to accept the SDR data authorized by this Order for auditing and enforcing compliance with NFA member requirements, and to safeguard from public disclosure any information contained in such SDR data.

Accordingly, NFA's direct electronic access to SDR data is specifically conditioned on NFA (1) safeguarding from public disclosure any information contained in such SDR data (other than pursuant to the limited exception specified below); (2) referring any request for such data received by NFA to the Commission for response directly by the Commission; (3) in no event disclosing any information regarding the identity of a counterparty to a swap, or such counterparty's clearing member for such swap, that an SDR would be prohibited from disclosing pursuant to Commission regulation 49.17(f)(2); and (4) accessing and using the SDR data obtained pursuant to the authority provided by this Order solely to facilitate NFA's performance of functions delegated to NFA by the Commission and NFA's performance of its functions as an RFA.

Notwithstanding such conditions, upon request of a firm, NFA may disclose SDR data of that firm to such firm (other than information an SDR would be prohibited from

disclosing pursuant to Commission regulation 49.17(f)(2)), subject to NFA receiving proper verification of the identity and authority of the person making the request on behalf of such firm.

Further, the Commission hereby delegates to the Director of the Division of Swap Dealer and Intermediary Oversight the authority to: (1) limit or otherwise condition NFA's direct electronic access to certain SDR data that such Director may determine in writing is unnecessary to facilitate NFA's performance of functions delegated to NFA by the Commission and the performance of NFA's functions as an RFA; and (2) direct Commission staff to review, examine, or audit NFA's access and use of the SDR data as such Director may determine is necessary to ensure NFA's compliance with the conditions of this Order. Nothing herein shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this paragraph.

This Order does not authorize NFA to render "no-action" positions, exemptions, or interpretations with respect to applicable disclosure, reporting, recordkeeping, and registration requirements.

The Commission retains the authority to condition further, modify, suspend, terminate, or otherwise restrict any of the terms of the Order provided herein, in its discretion, including the kind of SDR data accessible through direct electronic access. Nothing in this order shall prevent the Commission from exercising its authority to receive direct electronic access to SDR data or its authority to authorize any other person to be a designee of the Commission to receive such access. Nothing in this order, or in Section 8a(10) or 17(o) of the CEA, shall affect the Commission's authority to review the performance by NFA of its oversight of its members, to adopt and enforce regulations

applicable to SDs and MSPs as Commission registrants, and to conduct on-site examinations of the operations and activities of SDs and MSPs as Commission registrants.

Issued in Washington, DC on February 10, 2016, by the Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

**Appendix to Order Authorizing the National Futures Association as a Commission
Designee for Direct Electronic Access to Data in Swap Data Repositories –
Commission Voting Summary**

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

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